IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. [redacted] 12

BAYARD EDWARD RYAN, . . . Petitioner,

versus

UNITED STATES OF AMERICA, . . Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX.

	PAGE
Reason for granting the writ	1
Conclusion	5

CITATIONS.

Cases:

	PAGE
U. S. v. *Max Powell and William Penn Laundry, Inc.* (Third Circuit) filed on December 23, 1963	1

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No. 590

BAYARD EDWARD RYAN, - - - *Petitioner;*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

REASON FOR GRANTING THE WRIT.

The respondent, in its Brief, correctly acknowledged that there is a conflict between the First Circuit and the Sixth Circuit on the issue here involved.

The Tax Division of the Department of Justice in Washington, D. C., by long distance telephone has just apprised counsel for petitioner of the recent case in the Third Circuit of *U. S.* v. *Max Powell and William Penn Laundry, Inc.*, which case was not filed until De-

cember 23, 1963. The *Powell* case is clearly in conflict with the instant Sixth Circuit case.[1]

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[1]The Third Circuit appears to believe the *Ryan* case to be distinguishable from the *Powell* case as that court stated as follows:

> ". . . However, the opinion (referring to opinion of Sixth Circuit) shows that the petitioning revenue agent testified in the enforcement proceeding and explained the basis of his apprehension concerning fraud. Moreover, the decisive conclusion of the Court of Appeals was that 'the District Court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary.'"

In the trial before the District Court in the *Ryan* case, the revenue agent did *not* pretend to offer and did not offer any testimony as to his belief of fraud or as to any facts of the basis of any such belief. The Sixth Circuit, relative to the testimony of the revenue agent, merely said—and correctly so, that—

> "At the hearing in the District Court, Internal Revenue Agent Whelan testified that as a result of his examination of taxpayer's records for 1954-1958 he determined a deficiency; that it is necessary to examine taxpayer's books and records for the years 1942-1953 for two reasons. First, *in order to determine the taxpayer's correct tax liability for those years* and second, to procure information for net worth computations for the years 1954-1958. (We are advised that since the hearing in the District Court taxpayers settled with the government for the years 1954-1958. This settlement would not affect the right which the government may have to obtain the records to determine taxpayer's correct tax liability for 1942-1953.)" (Italics supplied.)

At page 9 of the Petitioner's Brief filed with the Sixth Circuit there appears the following:

> "In the instant case, counsel for taxpayer argued that the agent should be required to reveal to the Court facts indicating a reasonable basis for suspicion of fraud of the agent for the years 1942 to 1953, inclusive, inasmuch as these years were barred by the statute of limitations except for fraud (R. 2, 3, 17, 18, 19, 22).
>
> "The Trial Court ruled against the taxpayer and held that, under the statute (Sec. 7602, Internal Revenue Code), fraud was not involved in and had no bearing on the issue because fraud was not an element of the law (R. 27, 28, 21, 22); and that the statute said nothing about the agent's having to believe that there was fraud or his having to be

(Footnote continued on following page)

suspicious of fraud. The words of the Trial Court were as follows (R. 27, 28):

> 'The Court: I don't think, Mr. Bagby, that the question of fraud enters into it. This statute says nothing about the agent having to believe or be suspicious of fraud. That is not an element of the law at all. . . .'

The Trial Court held that the agent had a right to the books irrespective of what he (the agent) thought of fraud and that what the agent thought made no difference (R. 28). The Trial Court said whether the agent thought fraud or no fraud or whether the agent's thinking was erroneous or whether he had nothing to base an opinion on was not the question, as follows (R. 28):

> 'In other words, it gives them the right to examine all of the available data irrespective of what they might think about fraud. What difference does it make what this agent thought? That is not the determining factor in this case. Whether he thought fraud or not fraud or whether his thinking was erroneous or whether he had nothing to base an opinion on is not the question. This is an examination to determine whether or not there was fraud' (R. 28).

"The Trial Court further said that the agent was not starting his examination with the idea that there was fraud; that the reason the agent wanted the records was to determine whether or not there was fraud (R. 19).

"The Trial Court further held that, any taxpayer, at any time and for any year (whether barred or not by the statute of limitations) can be forced to make a full disclosure of his books and records (R. 19, 21); that an agent can stop the first man he sees on the street, and make him, then and there, surrender his books and records for any year. The exact works of the Trial Court were as follows (R. 21, 22).

> 'Mr. Bagby: No, we are not trying that, Your Honor. What we mean is there must be some facts of some sort, some indications, that there was fraud.
>
> 'The Court: No, absolutely not. No, sir. They can go into anybody's tax business they want to, any taxpayer, fraud or no fraud. They don't have to prove fraud before they go into it. *They can ask anybody, go out there and stop the first man they meet on the street and say, "We want to see your books," and you have to let them have them.*
>
> 'Mr. Bagby: Then your position on that—my question is irrespective of fraud, they have a right to look at the records'?
>
> "The Court: Yes, sir. They do at all times. . . ."

(Italics supplied.)

The Third Circuit in the *Powell* case, upon considering Sections 7602, 7604(b) and 7605(b) of the 1954 Internal Revenue Code, held and stated as follows:

> "Rejecting this view, we consider it significant that section 7604(b) requires a 'hearing' on the application to enforce the administrative summons at which 'satisfactory proof' shall be made. We think this provision means that the Court shall decide on the basis of the showing made in the normal course of an adversary proceeding *whether the agent's suspicion of fraud is reasonable. O'Connor* v. *O'Connell,* 1st Cir. 1958, 253 F. 2d 365, followed in *Lash* v. *Niqhosian,* 1st Cir. 1959, 273 F. 2d 185, *cert. denied,* 1960, 362 U. S. 904; *United States* v. *Carey,* D. Del. 1963, 218 F. Supp. 298. . . .
>
> "Our conclusion is in accord with the ruling of the Court of Appeals for the First Circuit in *O'Connor* v. *O'Connell, supra,* and contrary to the language of the Courts of Appeals, for the Second Circuit in Foster v. United States, supra. . . ." Italics supplied.)

The respondent in its Brief stated at page 7, as follows:

> ". . . The decision below is clearly correct, and is in accord with the decisions of four of the five other circuits which have passed upon the question. . . ."

Other than the above mathematics of the alleged more circuits for its view, which proposition has now changed, the sole and only basis of the objection by the respondent to the acceptance and consideration by this

Court of the question involved was, as follows: (page 7 of Respondent's Brief)

> ". . . ; and there is no need for uniformity among the circuits on the relatively unimportant question involved. . . ."

However, it must be that there is the greatest need for uniformity among the circuits because the question here is indeed vital to every one of the some 80 million taxpayers in the country. It touches the life of every person who files a return, no matter where he lives or how much or how little income he may report. It affects the rights, liberty and freedom of every citizen of the United States.

The Constitution requires that taxes be uniform in rates and applied the same to every taxpayer, irrespective of the State or area from which he or she hails. The same Constitution surely requires that the enforcement of the tax apply the same. This would appear to be a vital question.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1964.